In The

Supreme Court of the United States

October Term, 1977

No. 77-1671

MODJESKA SIGN STUDIOS, INC.,

Appellant,

v.

PETER A.A. BERLE,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

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Appellee, Peter A.A. Berle, Commissioner of Environmental Conservation of the State of New York, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, moves this Court, pursuant to Rule 16 of the Revised Rules of this Court, to dismiss the appeal herein on the following grounds:

I. This Court does not have jurisdiction to hear this appeal since the determination appealed from is not a "final determination" within the meaning of 28 U.S.C. § 1257(2);

II. No substantial Federal questions are presented by this appeal.

Opinion and Determinations Below

The opinion of the New York Court of Appeals, dated December 21, 1977, is reported at 43 NY2d 468 and is set forth as Appendix "A" to appellant's "Jurisdictional Statement" (hereinafter "J.S."), at pages 1a - 13a.

The Court of Appeals in its "Remittitur", also dated December 21, 1977 (J.S., App. "D", pp. 31a - 32a), "remitted the case to Supreme Court, Albany County, *for further proceedings* in accordance with the opinion herein".[1] (Emphasis ours.)

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

It is appellee's position (as discussed in Point I of "Argument", *infra*, pp. 8-10) that this Court does not have jurisdiction to hear this appeal.

Statutes Involved

I. *Federal Statute*

Appellant claims that the determination by the New York State Court of Appeals is a final judgment and, therefore, it may appeal to this Court therefrom pursuant to 28 U.S.C. § 1257(2), which, in relevant part, provides:

> "§ 1257. State courts, appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •

[1]Thereafter, the Court of Appeals, by order dated February 22, 1978 (J.S., App. "E", p. 39a) denied a motion by appellant herein (and by the appellant in a related case, entitled *Suffolk Outdoor Advertising Co.* v. *Hulse* [which case is being simultaneously appealed to this Court]), "for reargument of the appeals • • • or, in the alternative to amend the remittiturs herein • • • ".

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

II. *New York State Statute*

The statute challenged on this appeal is § 9-0305 of the Environmental Conservation Law of the State of New York (hereinafter ECL, § 9-0305). This statute bars the erection or maintenance of any off-premises outdoor advertising signs, device or structure within the boundaries of the Adirondack and Catskill Parks[2] without a permit issued by the New York State Department of Environmental Conservation. This statute was made applicable to the Catskill Park by Laws of 1969, Chapter 1052, effective May 26, 1969, which provided that all signs in the Catskill Park not eligible for a permit were to be amortized over a period of time to be individually determined for each sign, and then removed.

By Laws of 1970, Chapter 392, effective May 1, 1970, the statute was further amended to provide a general amortization period of 6-1/2 years for signs in the Catskill Park, in place of the individually determined amortization periods.

The relevant portions of the statute, as currently in effect, provide:

> "§ 9-0305. Signs and advertising in Adirondack and Catskill parks.
>
> "1. In order to conserve the natural beauty of the Adirondack and Catskill parks, to preserve and regulate the said parks for public uses for the resort of the public for recreation, pleasure, air, light and enjoyment, to keep them open, safe, clean, and in good order for the welfare

[2]It should be noted that the state-owned lands, consisting of a substantial portion of said parks, are constitutionally protected and required to "be forever kept as wild forest lands." (N.Y.S. Cons., Art. XIV, Section 1.)

of society, and to protect and conserve the investment of the state in forest lands, campsites and other interests in real property in said parks, no person shall erect or maintain within the boundaries thereof any advertising sign, advertising structure or device of any kind, except under written permit from the department. The provisions of this section shall not apply to signs erected or maintained upon a parcel or real property in connection with the principal business or principal businesses conducted thereon and which advertise such business or businesses only, or to signs within the limits of an incorporated village.

"As to signs, structures or devices existing within the Catskill park on May 26, 1969, and which require a permit pursuant to this section, the same may continue to be maintained without permit until January 1, 1976 provided that the property owner or owner of such sign, structure or device registers the same with the department on or before January 1, 1972.

* * *"

Questions Presented

I. Is the opinion and order of remittitur of the New York State Court of Appeals — which reversed the order of the Appellate Division of the Supreme Court of the State of New York and remitted the case "for further proceedings in accordance with the opinion herein" — a final judgment within the meaning of 28 U.S.C. § 1257(2), thus giving this Court jurisdiction to hear this appeal?

II. Since it is well settled that a state statute regulating the place and manner of outdoor advertising signs for aesthetic purposes, and which contains an amortization period for phaseout of existing non-conforming signs, constitutes a valid exercise of the police power, and that such a statute neither violates the freedom of speech provisions of the First Amendment nor constitutes a deprivation of property without due process in violation of the Fourteenth Amendment, do claims that ECL, § 9-0305 violate the aforesaid provisions of the First and Fourteenth Amendments present substantial Federal questions warranting plenary review by this Court?

Statement

In its "Statement" (J.S., pp. 4-10), appellant sets forth an argumentative version of the "facts", liberally supplemented by statements of opinion and "facts" not contained in, nor supported by, the Record on Appeal before the New York State Court of Appeals. Appellant, by the paucity of its references to that Record, implicitly acknowledges that the bulk of its "facts" were not before the Court below.

We therefore set forth what we submit is the essential factual background of the case.

Appellant is the owner of approximately 96 outdoor advertising signs located in the Catskill Park (R. 92)[3], all of which were erected prior to May 26, 1969, when the provisions now contained in ECL, § 9-0305 became applicable to the Catskill Park.

ECL, § 9-0305 prohibits the erection of off-premise advertising signs or structures within the Catskill or Adirondack Parks, except under written permit from the Department of Environmental Conservation. The statute expressly exempts from its scope all "signs within the limits of an incorporated village." It also provides that signs within the Catskill Park existing prior to May 26, 1969, may continue to be maintained without a permit until January 1, 1976. As stated at page 8 of Appellant's Jurisdictional Statement, appellant's signs are not eligible for permits under rules promulgated by the Department of Environmental Conservation and, hence, as of January 1, 1976, the signs were subject to removal.

Appellant commenced this action in the New York State Supreme Court, Albany County, for a declaratory judgment on December 30, 1975, by service of the summons (R. 23) and

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[3]Unless otherwise noted, parenthetical references (R.) are to the Record on Appeal before the New York State Court of Appeals.

verified complaint (R. 24-41), together with an order to show cause (R. 18-20), seeking a preliminary injunction. Appellant's complaint contained allegations, *inter alia*, that ECL, § 9-0305 was unconstitutional on its face in that (a) it effects a deprivation of property without due process of law, in violation of the Fourteenth Amendment, and (b) it effects an impermissible abridgment of speech, in violation of the First Amendment.

Appellee cross-moved (R. 42-48) to dismiss the complaint for failure to state a cause of action and requested that such motion be treated as one for summary judgment, on the grounds that no material question of fact existed and the complaint raised solely questions of law which must, on the basis of settled decisional law of the State of New York, be decided in appellee's favor.

New York Supreme Court, Special Term, denied appellant's motion for a preliminary injunction and granted appellee's cross-motion for summary judgment declaring the subject statute to be constitutional (R. 9-17). The New York Appellate Division affirmed (R. 88-97).

The New York Court of Appeals (the State's highest Court) reversed the order of the Appellate Division and remitted the case to Supreme Court, Albany County "to provide plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied" (43 NY2d at p. 481 [J.S., App. "A", p. 12a]).

The Court of Appeals did, however, uphold the constitutionality of ECL, § 9-0305 on its face, stating, "we cannot agree with plaintiff's contention that ECL 9-0305 unreasonably deprives it of property without due process of law" (43 NY2d at p. 477 [J.S., App. "A", p. 7a]). The Court of Appeals, instead, held ECL, § 9-0305 to be a reasonable exercise of the police power, reaffirming its "prior decisions holding aesthetics to be a valid basis for the exercise of the police power (see *Suffolk Outdoor*

Adv. Co. v. *Hulse*, 43 NY2d 483 [decided herewith])" 43 NY2d at p. 473 [J.S., App. "A", p. 2a]). The Court further stated that the statute did not constitute a "taking" of property without due process, since "it cannot be said that the prohibition of billboards deprives landowners or their lessees of all reasonable use of their property" (43 NY2d at p. 477 [J.S., App. "A", pp. 6a-7a]).

The Court did go on to differentiate the regulation of billboards premised on highway safety from that based solely on aesthetics, holding that "it would have been unreasonable to require, solely for aesthetic purposes, the immediate removal of the billboards prohibited in the present case" (43 NY2d at p. 478 [J.S., App. "A", p. 8a]). Thus, the Court remanded the case for determination of the reasonableness of the 6½ year statutory amortization period, as applied to appellant's signs, holding that it could not decide this issue on the basis of the record before it.

The New York Court of Appeals also rejected appellant's contention that ECL, § 9-0305 violates the First Amendment's guarantee of free speech, citing its discussion of that issue in the *Suffolk* case (43 NY2d at p. 481 [J.S., App. "A", p. 12a]), *supra*. In that case, the Court held that the prohibition of non-accessory billboards to promote aesthetics constituted a permissible regulation of the place and manner of speech to effectuate a significant government interest (43 NY2d 483, 489).

Argument

POINT I

The determination appealed from — having remitted the case to a trial court for further proceedings involving a constitutional issue — is not a final judgment. Therefore, this Court does not have jurisdiction to hear this appeal.

Appellant baldly asserts (J.S., p. 3) that this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C., § 1257 (2), which provision, of course, is applicable only where there has been a final judgment. However, appellant attempts to gloss over the actual determination made, by relegating to a footnote (Fn. "2", J.S., p. 3) the indisputable fact that the New York Court of Appeals remanded the matter for further proceedings involving a constitutional issue (whether the statute, as applied to appellant's billboards, effects a deprivation of property without due process). Appellant conclusorily asserts in this footnote that "there is no question as to the finality of the judgment", and in support of this blanket statement refers to *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). It is submitted that there is, indeed, much question as to the finality of the judgment and, in claiming the contrary, appellant has misread or misinterpreted the *Cox Broadcasting* case.

In *Cox, supra*, this Court discussed in detail four exceptions which have developed to the traditional rule precluding review by this Court where anything further remains to be determined by a state court, upon remand or otherwise. However, none of the four exceptions would appear to apply to the case at bar. Each concerns a situation where *all* the federal question(s) involved have been finally determined and the further proceedings to be completed concerned only non-federal issues. These exceptions are further limited to cases in which the additional state proceedings will not conceivably involve other federal issues that could require Supreme Court review at a later date.

In the case at bar, the two federal issues involved are freedom of speech and deprivation of property without due process.[4] While the New York Court of Appeals has made a final determination on the freedom of speech issue, there has not been any such final determination on the "taking" issue, since the remand is for the very purpose of providing "plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied" (43 NY2d at p. 481 [J.S., App. "A", p. 12a]). Surely, if appellant feels itself aggrieved by the determinations which remain to be made in the state courts as to the constitutionality of the amortization period as applied to its various billboards, it will, at such time in the future, still be able to claim that its property has been "taken" without due process — a federal issue which may be brought to this Court for review.

Thus, entertaining appellant's appeal at this time would not necessarily terminate the action, nor even preclude a later review by this Court of a federal question but, instead, might well result in the type "piecemeal" review which has always been eschewed by this Court. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

Moreover, it would seem that the case at bar is analogous to the eminent domain proceedings referred to by this Court in Footnote "6" of its opinion in the *Cox Broadcasting* case, *supra* (420 U.S. at pp. 477-478). In such cases, this Court has held that the state court judgment will not be considered as final unless it was dispositive of the entire case and adjudicated all issues including the issue of just compensation (see, also, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 [1945]). Accordingly, even though the First Amendment freedom of speech issue has been finally decided by the New York Court of Appeals, the Four-

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[4]In any event, it is appellee's position that neither of these issues raise any substantial federal questions. See Point II, *infra*, pages 10-18.

teenth Amendment question of whether appellant has been deprived of property without due process has *not* been finally determined by the New York Court of Appeals and, therefore, it is submitted that this Court should not sever the First Amendment issue while another federal question remains open.

POINT II

No substantial federal questions are presented of this appeal, since it is well-settled that a statute, enacted pursuant to a state's police power, which: (A) merely regulates the place and manner of commercial advertising, such as billboards, does not infringe upon freedom of speech in violation of the First Amendment; and (B) provides an amortization period for phase-out of pre-existing uses to enable an owner to substantially recoup his investment in such property prior to discontinuance of the use thereof, does not deprive the owner of property without due process of law in violation of the Fourteenth Amendment.

The predecessor to ECL, § 9-0305 first became a law in 1924 (L. of New York 1924, c. 512) and, from its very inception, it is clear that it was a regulatory statute enacted pursuant to the State's police power. As stated in its original form:

> "*In order to conserve the natural beauty of the Adirondack park by preserving and regulating it for public uses* • • • and to abate the public nuisance which has arisen through the unrestricted use of signs and billboards therein, no person shall erect or maintain within the boundaries thereof any advertising sign or billboard, *except under written permit from the commission.* • • • • " (Emphasis ours.)

After various amendments (not relevant herein), in 1969 (L. 1969, c. 1052), the statute was made applicable to the Catskill Park, and in 1970 (L. 1970, c. 392) the statute was further amended to provide for an amortization period of some six and

one-half years for non-complying signs in the Catskill Park (in place of individually determined amortization periods).

It cannot be too strongly emphasized that both the Adirondack and Catskill Parks (the boundaries of which are defined, respectively, in ECL, § 9-0101 [1] and [2]), are uniquely beautiful areas within the State of New York which have long been given special protection.[5] They consist of an inter-mixture of private and State-owned lands, with the State-owned lands — known as the "forest preserve" — being protected by Article XIV ("Conservation") of the New York State Constitution. Suffice it to say, as found by the Appellate Division of the Supreme Court of the State of New York in its opinion in this case (55 AD2d 340 [1977]) at page 343 (J.S., App. "B", p. 18a):

> "The Adirondack and Catskill State Parks are constitutionally protected preserves (N.Y. Const., art. XIV) wherein special material and cultural values exist which are deserving of preservation for future generations. Thus, objects, such as outdoor advertising structures, that offend the eye and detract from the natural beauty of the setting are legitimate targets of legislation requiring their removal providing the totality of the means employed is reasonable • • • "

That a State, as a proper exercise of its police power, may enact laws designed to conserve and protect the beauty and appearance of an area — particularly areas of inestimable value to the public such as the Adirondack and Catskill Parks — is now beyond any shadow of doubt. Almost twenty-five years ago, in the landmark and frequently cited case of *Berman* v. *Parker*, 348

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[5]The Adirondack Park was created in 1892 (L. 1892, c. 707) and the Catskill Park was created in 1904 (L. 1904, c. 233). As to the "special protection" given these areas, see, e.g., *People* v. *Adirondack Railway Co.*, 160 N.Y. 225 (1899), aff'd sub nom *Adirondack Railway Co.* v. *New York State*, 176 U.S. 335 (1900); Environmental Conservation Law, § 11-0529 and Public Lands Law, § 17.

U.S. 26 (1954), Mr. Justice Douglas, speaking for a unanimous Court, observed (p. 32):

> "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block* v. *Hirsch*, 256 U.S. 135) or the States legislating concerning local affairs. See *Olsen* v. *Nebraska*, 313 U.S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U.S. 525; *California State Association* v. *Maloney*, 341 U.S. 105. • • •"

Mr. Justice Douglas then declared (p. 33):

> "The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy spacious as well as clean, well-balanced as well as carefully patrolled. • • •."

Thus, it is unquestionable that the interests sought to be protected by ECL, § 9-0305 — aesthetic enhancement of uniquely beautiful regions of the State of New York through regulation of billboards and outdoor advertising signs — are constitutionally legitimate and proper objects of attainment by the State under its police power.

A.

With regard to the instant appeal, the appellee submits that it is not necessary for this Court to again review whether a statute which regulates the place and manner — *not the content* — of commercial speech, in order to serve an important government interest that is totally unrelated to suppression of free speech, is an impermissible abridgement of freedom of speech, since this Court has firmly and definitively determined that such type of regulation is not unconstitutional.

In *Markham Advertising Co.* v. *Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), the Supreme Court of Washington, in reviewing a statute strikingly similar to the statute now being challenged, rejected the advertising company's claim that the statute unconstitutionally abridged freedom of speech, and held that the minimal free speech interest affected by the statute was outweighed by the public's right to enjoy highways free of dangerous, obtrusive and unsolicited presence of advertising signs. Moreover, the Court specifically stated (439 P. 2d, at p. 259) "we hold that the maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised." This Court then dismissed, for want of a substantial federal question, the appeal taken by the advertising company (393 U.S. 316 [1969]), and also denied its petition for a rehearing (393 U.S. 1112 [1969]).

The law, therefore, is clear that a state legislature need not subordinate all other legitimate public interests to the protection of free speech, nor is it required to totally ignore such other legitimate public interests in order to preserve absolute freedom of speech (see, *Kovacs* v. *Cooper*, 336 U.S. 77, 88 [1949]). In this regard, it is noted that, in *United States* v. *O'Brien*, 391 U.S. 367 (1968), this Court declared (p. 377):

> " • • • we think it clear that a government regulation is sufficiently justified if it is within the constitutional

power of the Government; *if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.* • • • " (Emphasis ours.)

Nonetheless, the appellant, in attempting to cloak itself in the mantle of vindicator of First Amendment freedom of speech rights, contends that recent decisions by this Court — which decisions, admittedly, have blurred the distinction between commercial and ordinary speech — require this Court to give plenary consideration to the question of whether the regulation of the place and manner of appellant's billboards accomplished by the subject statute effects an unconstitutional abridgment of appellant's freedom of speech. In support of its request for plenary review, appellant cites *Virginia Pharmacy Bd.* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), and urges that the tests set forth in that case for a statute to pass constitutional muster have not been satisfied in the case at bar.

In the *Virginia Pharmacy Bd.* case, *supra*, this Court held (425 U.S., at p. 771) that for a statute to permissibly infringe upon freedom of speech, it could not be directed to the content of the regulated speech; it must serve a significant governmental interest; and must leave open ample alternative channels for communication of information.

That the statute in question fully satisfies these tests is easily demonstrated. Initially, it is important to again note that ECL, § 9-0305 *does not constitute a prohibition of outdoor advertising signs* since it expressly exempts from regulation signs "erected or maintained upon a parcel of real property in connection with the principal business or principal businesses conducted thereon" and any signs located "within the limits of an incorporated village." That the subject statute is not in any way directed to the content of signs or billboards and is self-evident from the words of the statute itself and from the fact that appellant's claim of unconstitutionality is limited to the two contentions that no significant governmental interest is served by the statute and that the available alternative channels of communication are inadequate.

As to the interest served, there can be no doubt whatsoever — as previously discussed — that the subject statute is a proper exercise of the police power enacted to attain a significantly important governmental interest, which interest clearly outweighs the minimal infringement of speech occasioned by the statute. Thus, appellant's challenge reduces itself solely to the claim that alternative channels of communication are not adequate.

However, the speciousness of this claim — notwithstanding appellant's imaginative attempts to "prove" the "uniqueness" of its billboards as a means of communication — is established by the factual finding of the New York Supreme Court in this case (87 Misc 2d 600, 606 [J.S., App. "C", p. 29a]) that "there are ample other channels of communication available in the affected area such as radio, television and newspapers", and the concurrence with this factual finding by the Appellate Division (55 AD2d 340, 345 [J.S., App. "B", at 20a]) when it noted that "[t]he same information [conveyed by appellant's billboards] can be conveyed to the public by newspaper, radio or television advertising." This factual finding, which was not, and could not be, questioned by the New York Court of Appeals[6] conclusively refutes appellant's arguments that alternative channels of communication for the supposedly "unique" medium of billboards are inadequate.

Moreover, there are at least two very recent decisions by this Court which further substantiate that the challenged statute does not effect an impermissible abridgment of speech, and these

[6]In cases such as the one at bar, the Constitution of the State of New York, Article VI, § 3 (a), provides that the jurisdiction of the New York Court of Appeals "shall be limited to the review of questions of law."

cases (*Young* v. *American Mini Theatres*, 427 U.S. 50 [1976] and *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 [1977]) inexorably point to the conclusion that the question herein is not a substantial federal question.

In the *Young* case, *supra*, this Court, although emphasizing its prior holding in *Virginia Pharmacy Bd.* v. *Virginia Commercial Council, Inc.*, 425 U.S. 748 (1976), *supra*, that commercial speech is entitled to some protection under the First Amendment, nonetheless explicitly stated (427 U.S., at p. 68) that "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere" and, in support of this statement, cited (see fn. 30, 427 U.S., at p. 68), the case of *Markham Advertising Co.* v. *Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316 (1969), *supra*.

Similarly, in the *Linmark Associates* case, *supra*, while this Court struck down the township's ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs on lawns because the challenged ordinance was found to be directed at the *content* of the signs — not merely the time, place and manner of speech — this Court suggested (431 U.S., at p. 93) that had Willingboro's ordinance been genuinely concerned with the place or manner of speech, or even "prohibited all lawn signs — or all lawn signs of a particular size or shape — *in order to promote aesthetic values*" (emphasis ours), the ordinance could have survived constitutional scrutiny. Further, in making this observation, this Court, in a footnote (see fn. 7, 431 U.S., at p. 94), cited, with apparent approval, the *Markham Advertising Co.* case, *supra*.

Clearly, the freedom of speech issue in the case at bar is so foreclosed by recent decisions of this Court as to leave no room for real controversy and, therefore, cannot be deemed to present a substantial federal question warranting plenary consideration by this Court.

B.

Appellant's claim that the subject statute effects a deprivation of property (i.e., a "taking") without due process of law in violation of the Fourteenth Amendment, is also without merit. This claim is bottomed on the argument that an amortization period — no matter how lengthy the period may be — can never be a constitutionally adequate equivalent for compensation. Surely, in the face of existing precedents, such argument is patently frivolous.

As with the freedom of speech issue, the case of *Markham Advertising Co.* v. *State of Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), *supra*, points to the conclusion that the "taking" issued does not present a substantial federal question warranting plenary review by this Court. In *Markham*, the challenged statute provided for a maximum amortization period of some four years, and the Washington Supreme Court held that both the concept of amortization in lieu of compensation and the length of the amortization period provided were constitutional. As previously noted, this Court dismissed the appeal taken by Markham for want of a substantial federal question (393 U.S. 316 [1969]), and also denied the petition for a rehearing (393 U.S. 1112 [1969]).

Similarly, in *Art Neon Co.* v. *City and County of Denver*, 488 F. 2d 118 (10th Cir., 1973), the Tenth Circuit upheld the constitutionality of amortization periods of two to five years for the termination of signs made non-conforming by the subject ordinance, and this Court then denied a petition for certiorari. 417 U.S. 932 (1974).

Finally, in *National Advertising Co.* v. *County of Monterey*, 464 P. 2d 33 (1970), the ordinance provided that billboards in "U" (unclassified) districts were to be removed within one year after the property on which a sign was located was reclassified into some other district. The Supreme Court of California declared that this one-year amortization period was constitutional with

respect to signs which had already been fully amortized, and that other signs should be removed after the "expiration of a reasonable amortization period in order to permit plaintiff to recover their original cost" (464 P.2d, at p. 36). Certiorari was thereafter denied by this Court. 398 U.S. 946 (1970).

As to the case at bar, it is important to note that ECL, § 9-0305, on its face, provides for an amortization period of some 6-1/2 years — significantly longer than the periods in the above-discussed cases. Moreover, the Court of Appeals, in construing this statute, not only upheld the 6-1/2 year amortization period as being a constitutionally adequate and permissible alternative to compensation but, additionally, directed (43 NY2d at p. 481 [J.S., App. "A", p. 12a]) that the case be remanded for a hearing "to provide plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied." Cf. *National Advertising Co.* v. *County of Monterey, supra.*

Surely, under the circumstances herein, appellant's claim of deprivation of property without due process of law does not present a substantial federal question and, indeed, is specious.

CONCLUSION

This Court should dismiss the appeal on the ground that there has not been a final judgment or, in the alternative, that no substantial federal questions are presented.

Dated: July 6, 1978

Respectfully submitted,

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